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FEB 7 1903
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APPELLANT'S REPLY BRIEF

Supreme Court of the United States

OCTOBER TERM, 1902

No. 193.

THE SAN DIEGO LAND AND TOWN COMPANY
APPELLANT,

vs.

JAMES A. JASPER, ET. AL.
APPELLEES.

JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
Counsel for Appellant.

Filed, February ——— *1903.*

IN THE

SUPREME COURT

OF THE

UNITED STATES

SAN DIEGO LAND AND TOWN COMPANY,
Appellant,
vs.
JAMES A. JASPER, et al.,
Appellees.

APPELLANT'S REPLY BRIEF.

A ponderous brief has been filed by counsel for the appellees, that seems to call for some additional observations on our part, particularly as to the basis upon which rates should be established under the constitution and statutes of California.

I.

APPELLANT WAS ENTITLED TO A DECREE PRO CONFESSO.

This question was presented, somewhat fully, in our opening brief.

Opening Brief, pp. 9-14.

But the authorities relied upon by counsel, to uphold the ruling of the court below, on this point, were not noticed, except in a general way.

It will be found, upon an examination of those cases, that they are not analagous to the case at bar, and can have no force in support of the ruling here. They are not cases relating to adversary proceedings, by private individuals, as in this case, but are cases where a public body is acting *for the state* or upon its *own initiative in a matter affecting the public generally*. This is well illustrated, in this state, by cases affecting the fixing of rates by city councils or other bodies, in cities and towns, where they are required, by the constitution, to fix rates *annually*, and without petition or request from any one.

Constitution Cal., Art. XIV, Sec. 1.

Manifestly, in such cases, the rate fixing body must be the proper and necessary party in an action to set aside the rates, because there is no other party, and the state is assuming to act without the request or petition of any one. The federal cases cited by counsel belong to this class, and in most of them no question was raised as to who were proper or necessary parties. The statutes of the various states, providing for railroad commissioners, are the most common of this kind of statutes, and the cases cited by counsel are cases affecting the powers and duties of such commissioners where there could be no possible doubt but that the commissioners were the only proper parties; and, in most of the cases of this class cited by counsel, no question as to who were proper parties was decided or even suggested. Therefore, they need not be noticed, further than to say that such cases relating to official bodies of this kind, dealing with and for the public, as a whole, can have no bearing upon a case of this kind, involving the right of a few individuals, and where the statute simply constitutes the board of supervisors a court to hear and determine a question presented by petition and upon notice and proof.

But counsel relies, chiefly, upon St. Louis & San Francisco Ry.

Co. vs. Gill, 156 U. S., 649. And no case could more clearly demonstrate the correctness of our position and the distinction we point out than this one. That was a case where the rates of a railroad company were fixed by a state statute. An action was brought by Gill, a private individual, alleging that the defendant corporation had charged him a rate in excess of that fixed by the statute. As is well said in that case:

"But it will be observed that the state was represented by the commission, and that the remedy went to the validity of the legislation as affecting the railroad company's business as a whole. It was not a suit between the company and an individual customer."

St. Louis & San Francisco Ry. Co. v. Gill, 156 U. S., 659.

And again:

"Sometimes in acting on this subject the state legislatures have created commissions or boards of public works, with power to establish rates for the transportation of passengers and freight, and in such instances the course recommended by Mr. Justice Miller, already cited, may well be followed; that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity or some equivalent proceeding, wherein the rights of the public as well as those of the company complaining can be protected.

"But there are other cases, and the present is one, where the legislatures choose to act directly on the subject by themselves establishing a tariff of rates and prescribing penalties. In such cases there is no opportunity to resort to a compendious remedy, such as a proceeding in equity, because there is no public functionary or commission which can be made to respond, and therefore, if the companies are to have any relief it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defense to an action for the collection of the penalties."

St. Louis & San Francisco Ry. Co. v. Gill, 156 U. S., 667.

The distinction between cases where the state acts directly by legislation and where it acts through a public body, such as a railroad commission, is here clearly pointed out. But, as was very properly said, in the one case the state is represented by the commission and a corporation may sue in equity to set aside the rates, as in violation of its constitutional rights, but in the other, as there is no one to sue, it must seek relief by way of defense to an action to recover the penalties imposed by the statute.

But the nature of the remedy to be obtained in each of these cases must be sought, in either case, against the state or its official representatives, as there can be no other party.

Here, however, it is clear no such rule can apply. In this case the board is not acting for or as the representative of the state, except as any other court, exercising its judicial functions, represents the state. It acts upon a suit regularly brought upon petition and notice, and is called upon to adjudicate the questions presented the same as any other court. Its function is to adjudicate between the private individuals filing the petition and the private corporation against whom the petition is filed. No appeal is allowed from its judgment. And if the effect is to violate the Constitution of the United States by taking property without due compensation the judgment may be set aside in an action against the judgment plaintiffs, as in other cases. Here the petitioners, by their default, admitted the invalidity of the decree. The state of California is not represented, as a party to the proceedings, nor is the county of San Diego by its board of supervisors. Neither of them has any interest in the controversy.

The concurring opinion of Mr. Justice Miller, in Chicago, Milwaukee etc. Ry. Co. v. State of Minnesota, 134 U. S., 418, is equally beside the point. The case is one of the class above mentioned, and the conclusions of the learned Justice are in entire harmony with other cases of the same kind. The proceeding here does not fall within his statement that until the whole question of the reasonableness of the rates is determined in a general suit for that purpose it is not competent for an individual dealing with the company to raise such a contest in his own behalf. Here the suit is between the parties to the decree rendered between them, by the board of supervisors, and involves the validity of the rates as a whole.

We submit that the cases cited by counsel, not only do not militate against our contention, but only tend to confirm it.

II.

WAS THE PLAINTIFF'S PROOF OF VALUE DEFECTIVE AS CLAIMED.

It is earnestly insisted by counsel that the proof of value made by the appellant before the Board of Supervisors and in the court below was so defective as to furnish no basis for fixing the rates. This position is founded upon certain language used by this court in San Diego Land and Town Co. v. National City, 174 U. S., 739. It was there insisted by appellant, in the case of fixing rates inside of cities and towns, under the Constitution of California, that the board of trustees of the City of National City should, in ascertaining what were just rates, have considered the cost of the appellant's plant, the cost per annum of operating the plant, including interest paid on money borrowed, and reasonably necessary to be used in constructing the same, the annual depreciation of the plant from natural causes resulting from its use, and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on money it had expended for the public use, or upon some other fair and equitable basis.

With respect to this contention, this court said that undoubtedly all these matters ought to be taken into consideration, and due weight given to them, but said further:

"The basis of calculations suggested by appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration."

Upon this language of the court counsel has argued at great length that there was not sufficient proof in this case to establish any basis for fixing rates. But he discloses the fact in his own brief that there was proof, first, of the actual cost of the plant; second, of the amount of depreciation; third, of the amount for which the plant could be duplicated at the time the testimony was

taken; fourth, of the amount and value of the outstanding bonded debt of the corporation; fifth, of the price at which the property was sold at foreclosure sale; and, sixth, of the price for which it was assessed for taxation.

Now, what other proof there could, in the nature of things, have been made of the actual present value of the plant, we are unable to understand. Was it necessary or proper to prove the *market* value of the property, or can that be taken as a basis of fixing the rates under the statute of this state which requires in express terms that a return shall be provided upon the value of the property, and how would it be possible to prove the market value of a water plant and system not coming in competition with any other such system in the same locality, and where there could by no possibility be any basis upon which to fix the market value? The trouble here is that the Board of Supervisors did not, as this court expressly held that it should do, take into consideration all of these things in arriving at the actual value of the plant, but based its conclusion solely upon two of them, as their findings expressly state, namely: the price at which the property was sold at foreclosure sale, and at which it was assessed for taxation. They recite in their findings as follows:

"This matter, coming on regularly to be heard, and the evidence all being presented, the board, after a careful consideration of all the testimony regarding the value of the water plant of the San Diego Land and Town Company of Maine, including the amount at which the entire property has recently been sold, to-wit: $880,163.33, and the proportionate value of the said plant to the whole of the property sold, and the amount at which said plant has been carried upon the assessment rolls of the county for the past eight years, to-wit: $155,000.00, we estimate and determine the value of said plant to be $350,000.00."

Record, p. 61.

And Mr. Cherry, the only member of the Board of Supervisors that was called to explain how they arrived at their valuation, expressly testified that they did not figure on the original cost of the

plant in arriving at their findings, but took as the basis the price the plant was sold for at the late sale.

Record, p. 78.

Again, he says: "We took in connection with it the assessed valuation, and we thought we were liberal in doubling it."

Record, p. 78.

There is no dispute or contradiction of this witness as to the basis of arriving at the valuation of the plant. None of the other evidence referred to above tending to establish the actual value of the plant was considered at all, and the only way in which the conclusion reached in this case can be justified is by establishing that as a matter of law the price at which the property was sold and the assessed value thereof for taxation were the only two things competent to be considered in arriving at its value.

III.

WHAT IS THE TRUE BASIS OF VALUATION.

We endeavored in the case of San Diego Land and Town Company vs. National City, above cited, to convince this court that the only correct basis of fixing rates under the constitution of this state, and not under the statute involved here, was the actual, necessary cost of the plant to the water company. We submit with deference that the decisions upon this point evince an entire misconception of the true basis upon which rates of compensation for companies of this kind should rest. Under the statutes and decisions of California, the water company is in legal effect a trustee for the consumers under its system, and must furnish them with water at prices to be fixed as provided by law. It has, for the public good, invested a certain necessary sum of money to store and distribute the water. It should have a just and reasonable return upon that investment—no more, no less. To say that the present value of the plant shall be taken as the basis is to require an utter impossibility when it comes to making proof of the necessary facts to entitle the company to compensation, because it is impossible to

prove in any way the present value of a plant of this kind. And if it were possible, the basis would shift and change from year to year, when the service to the consumer is precisely the same, and of equal value to him. But this court has so held, and leave these water companies and their consumers in California upon a sea of uncertainty that renders it impossible to arrive at any reasonable and just conclusion by rate fixing bodies or the courts in adjusting controversies between the companies and their consumers. And if the rule laid down by this court is to be adhered to, and the actual value arrived at, how is it to be done? Can the price at which property has been sold to the last owner be taken as its actual value? If so, then we are trampling the rule of the court under foot by returning to the question of costs instead of value. Can the price at which the property was assessed for taxation be taken as the value? If so, the price at which a water company is to supply water to its consumers is determined by the ideas of the County Assessor, and it is notoriously true that assessments never represent the actual value of property. In this case, it is clearly shown, as we have pointed out in our original brief, that it does not represent the true value. Is there any more reason why the value of the bonded debt of the company should be taken as fixing its value? What is it that makes the value of the bonds of a water company. Certainly not the value of its dams and pipe lines, but the revenues that can be derived from them; and that revenue is determined, unfortunately, by a local and interested Board of Supervisors, and in this case, upon a basis that means absolute ruin to the company. Can the market value of the property be taken as its "value," provided for by the statute? How could its market value be proved by any possibility? Its market value, like the value of its bonded debt, would depend almost entirely upon its capacity for yielding revenue. If the rates allowed would return a reasonable percentage of interest upon $1,000,000.00, and provide a sinking fund sufficient to pay the bonds at maturity, its bonded debt, if nominally that amount,

would undoubtedly be worth $1,000,000.00. So would its market value. But would that be its actual value? And as this court says that in fixing the basis of rates, the value of the services to the consumer should be considered, what difference can there be in the value of such services whether the market value, the actual value, or the bonded debt of the company is worth $1,000,000.00 or $100,000.00? There is no way that this question can be looked at that does not demonstrate that the only reasonable and just basis for fixing rates of this kind is that of actual, necessary, reasonable cost to the company.

Correspondence of the officers of this company is referred to to show admissions on the part of such officers that this property could not have been sold to any third party for as much money as it was bought in for at the foreclosure sale for its own stockholders, who had organized another company. There can be no possible doubt of the truth of that statement. This company had been endeavoring, for ten years, first by peaceable means, and then by litigation, commencing in more cases than one before the city authorities and the Board of Supervisors, and ending in this court, to establish rates that would return it enough money to pay its operating expenses, and pay the interest on its bonds. It has, so far, been unable to do so. As we have pointed out in our opening brief, the general manager of the company testified that under the rate of $3.50 per acre fixed by the Board of Supervisors, the company could not make one dollar over and above its operating expenses, including the keeping of its plant in repair so as to be serviceable to the consumers, and this evidence stands undisputed. The company was unable to realize money enough to pay the interest upon the outstanding bonds to the amount of $500,000, less than one-half of the actual cost of the system, under the very same rates that are now being contested. It undertook, as counsel has insisted, to sell additional bonds secured by mortgage upon its plant, and could sell only one bond of $500.00. Now, what third party would buy a

property of this kind for $900,000.00, or any other sum, while such rates prevailed, and what was this property worth to the stockholders of this company, or anyone else, under such rates? If the present corporation, composed of the stockholders that have owned this property from the first, shall be unable to obtain any better rates than such as have prevailed hitherto, and which are now being contested in this action, this property is actually worthless, except what little might be realized by digging up the pipes and disposing of them, and any loose property connected with the plant. As a means of returning revenues to its stockholders, it is absolutely worthless. This is directly proved in the case, and is demonstrated by the experience of the company itself. As we have said, it could not pay its interest or its bonded indebtedness. It was forced into the hands of a receiver for that, and for no other reason. The stockholders undertook to raise a fund by their own contributions to pay the amount. Eighty per cent. of them contributed ten dollars a share for that purpose. The other twenty per cent. refused to put any more money into the concern, and in order to clear the title, the property was foreclosed upon, sold, and paid for out of the money thus contributed by the stockholders. Now they say, "Because you sold this property and bought it in under the name of another corporation for the amount that you had contributed to pay the debts of the company, you can no longer receive a return upon anything more than the amount so paid, although you, in the beginning, paid $1,026,000 to construct this plant." The proposition is nothing short of absurd.

One of the troubles, it seems to us, is that this court has, in determining this question of the proper basis for fixing rates, placed water companies upon the same basis as railroad companies. There is and can be no analogy between the two, except as to the general principle that a reasonable return shall be made to such corporations for services rendered by them to the public. A railroad company has a fixed and determinate value that can be easily ascertained and established by proof. With a water company, as we

have said, this is impossible. Most of its system is underground; its present condition is not ascertainable; the extent of depreciation resulting from different causes and different localities and soils can not be determined by any possibility, but must depend upon the final opinion of witnesses, except where the effect of the soil is demonstrated by taking up or exposing sections of the pipe. And it is the duty of a corporation of this kind to keep its plant in such repair that it will supply the water to its consumers. Its present value is to them of no consequence whatever. If it has depreciated in value fifty per cent., but is still supplying the water the same as before, the service to them is just as valuable as in the beginning, and they should be required to pay the same price that they paid in the beginning, which should be measured, as we have said above, by the investment for their benefit.

The company proved by sworn itemized statements the actual cost of its system, the cost of operation, the amount of depreciation, the receipts from rates, and all matters necessary to determine what would be a reasonable return to the company.

Record, pp. 128-132.

It could do no more than this. If it had asked any of its officers or employees what the market value of the plant was, they would have been unable to tell, as would any other witness, in the nature of things. The same would have been true if it had offered evidence of any of the other alleged valuations of the property suggested by counsel.

IV.

DEPRECIATION.

This question of depreciation is one of the vexed questions in controversies of this kind. Counsel insist that the depreciation of the plant should be deducted from its cost price, or its original value when constructed, and a return allowed only upon the difference between the two, as being its actual value. But neither the court below nor this court has agreed with that contention. The learned

judge of the court below held in this case that some return should be made to the company on account of depreciation as being a loss to the company which it must necessarily make good in order to enable it to continue to supply water to its consumers. The court says on this point:

"It is insisted on the part of the complainant that the board of supervisors made no allowance for the deterioration of the plant, and that the evidence plainly shows that the soil in which the pipes of this company are laid is of such a nature that the pipes rot and otherwise deteriorate much more rapidly than similar pipes in other soils, and require to be laid in from ten to twenty years. The evidence undoubtedly so shows, and that fact should be given due consideration *in fixing the rates and in determining their reasonableness.* But it is not just, I think, to charge all of the consequences of that unfortunate state of affairs to the consumers. To some extent, at least, it goes to lessen the value of the plant itself, and this fact must be given consideration by the court in deciding upon the effect of the action of the board of supervisors."

This certainly is rather a peculiar and novel conclusion to reach on this subject. It has almost, if not quite, uniformly been held that a return must be made to the corporation sufficient at least, over and above its operating expenses, to make good the depreciation of its plant resulting from its use, and a reasonable compensation to the company. In this case, the court seems to divide the two by allowing a part of the depreciation to the company and taking a part away from it. But even in that view of the law, the rate in this case, as fixed by the board of supervisors, was below the amount required to be returned to the company by the express terms of the statute. By the statute the rates must return not less than six per cent. on the value of the property. If the company is entitled to credit for any part of the depreciation as held by the court below, then the rate would be in violation of the statute to that extent. In the case of San Diego Land and Town Company vs. National City, *supra*, it was expressly held that the annual depreciation of the plant from natural causes resulting from its use, should be considered in arriving at just rates. It is said in the last case referred to, and reiterated in the opinion of the learned judge

of the court below, that "What the company is entitled to demand in order that it may have just compensation, is *a fair return upon the reasonable value of the property at the time of its being used for the public.*" And in both cases it is held that in connection therewith the company is entitled to receive at least something on account of depreciation. And by what just rule can it be held that when a company is bound under the law to furnish and keep in repair its plant in supplying water to the public, and to make good the depreciation of its plant for that purpose, no allowance should be made to it on account of the depreciation that it is thus bound to make good? Under the evidence in this case, it would be necessary for this company to practically replace its entire pipe line in twenty years, thus doubling its investment for the public use, and under the rule insisted upon in this case, the company would still be entitled only to interest upon the present value of the plant at any time the rates are fixed, which could never, by any possibility, be more than the original investment. We submit that there is no way of looking at this question that does not prove the correctness of the rule first contended for by us, that the actual, necessary investment is the true basis for fixing the rates. And we submit that this court, in justice to the appellant in this case, should return to that basis of fixing the rates.

V.

IS THE PLANT OF THE APPELLANT EXCESSIVE IN SIZE, AS COMPARED WITH ITS WATER SUPPLY?

The small amount allowed the appellant for supplying the water is attempted to be justified upon the theory that the water supply was not adequate to the size of the plant by and through which it was to be furnished. But this is based solely upon the contention of counsel noticed hereafter that there was a shortage, subsequent to the passage of the ordinance, of the water supply of the company. This, of course, must necessarily be only temporary, as the experience of the company for its entire existence prior to that time

demonstrated the fact that its whole system was necessary for the supply of the water, and that a great deal of the water was allowed to go to waste on account of the inadequacy of its reservoir facilities to store and retain it.

The board of supervisors, as its findings show, and as the evidence before it discloses, did not base the small rate fixed by it upon any such ground as this, and as said in our opening brief, the complaint had previously been made that the plant of the company was not sufficient in size to save and supply all of the water that might have been conserved for the use of its consumers, and this shortage, as shown hereafter, occurred subsequent to the fixing of the rates and the adoption of the ordinance, and could have had no effect upon the minds of the board of supervisors in arriving at such compensation.

VI.

DEFICIENCY IN THE WATER SUPPLY.

It is expected that an attorney practicing in this state will sufficiently apperciate the obligations of his position to deal fairly with the court and keep himself within the record. But the writer of the appellee's brief seems to recognize no such obligations.

We had reason to hope that we would be protected from such practices in this court, but find we were mistaken. We complained in our original brief that the court below upheld the valuation placed upon our plant by the board of supervisors by reference to evidence showing a shortage of the company's water supply, long subsequent to the time when the value was fixed and the ordinance in controversy adopted. This we regard as an inadvertance on the part of the learned judge of the court below that worked us a palpable injustice.

See opening brief, pp. 17, 18.

But counsel for appellees not only undertakes to uphold this means of justifying the board of supervisors, but deliberately and purposely goes outside of the record and manufactures a condition

of things claimed to exist not only after the hearing before the board, but *after the trial of the case before the court below.* It would not have been quite so bad if these assumed facts had been fairly and truthfully stated; but they are not. So counsel has not only gone outside of the record, but he has again attempted to deceive by not stating the real facts as they existed. He says:

"But we must trust to the candor of opposing counsel, so far as the years are not covered by the evidence, to concur with us in the following more specific statement of the actual conditions of the water supply to which the ordinance relates, during the five years next following November 16, 1897, the date of taking effect of the ordinance."

See Appellee's Brief, p. 74.

This is very clearly, but not very scrupulously, stated. The court would naturally understand that the amount of water stated as having been supplied was *all* of the water furnished by the company. But in order to justify his statement as not being absolutely false, as well as misleading, he confines himself to the "water supply *to which the ordinance relates.*" By this he means, we suppose, the water supply *stored from the natural rainfall.* But he purposely omits all water supplied by the company by means of pumps, and of which the consumers have had the full benefit.

It is clearly shown by the evidence that the company, without legal obligation on its part, has put in and operated a number of pumping plants, by which water has been supplied to its consumers sufficient for their needs and to protect their orchards.

Record, pp. 247-250.

But this is not water "to which the ordinance relates."

But he says further:

"For this fractional supply *full* irrigation rates have been paid under the ordinance."

He purposely leaves it to be understood by the court that the company insisted upon or enforced the payment of these rates for water not supplied "under the ordinance," whereas he knew, as one of the consumers, that they were so well pleased with this rate that they

insisted under his advice upon paying it. With respect to this matter, Mr. Boal, general manager of the company, whose testimony stands undisputed, testifies as follows:

"Q. Reference has been made here to the fact that your company charges the regular rate of $3.50 an acre, and in addition to that charges so many cents on the thousand gallons, on account of the extra cost of pumping. Do you know at whose instance that old rate of $3.50 per acre was retained in the contract?

A. At the instance of the water-consumers' committee with whom the contract was negotiated.

Q. Was not your proposition to charge simply an amount for the water that you pumped, foregoing the $3.50 rate for the time being, and they insisted upon retaining the regular rate?

A. That was our proposition.

Q. And that was their contention, was it not?

A. That was their contention, that the rate of $3.50 per acre should stand."

Record, p. 182.

And as to the domestic rates, there never has been any dispute between the company and its consumers, as the evidence shows, and at the instance of opposing counsel, Mr. Boal, general manager of the company, upon inquiry by counsel for appellees, testified as follows:

"Q. Your company collects domestic rates outside of National City, under the ordinance as passed by the board of supervisors involved in this case, does it?

A. It does.

Q. Is there any conflict between the company and consumers in respect to the domestic rates as fixed by the ordinance?

A. Not that I am aware of.

Q. Is it or is not true that the board of supervisors were informed by the concurrent action of the company and the representatives of petitioners and consumers named protestants before the board, that the rates as now fixed in the ordinance for domestic uses were satisfactory to all?

A. I believe it was stated before the board."

Record, p. 115.

Counsel would have the court to understand that the company furnished no water to its consumers except that which was stored from natural rainfall, when he knows this to be utterly untrue. This is a mode of presenting the case that should not commend itself to

a fair and candid mind. The writer of the brief, as we have shown, using his position as deputy district attorney of San Diego county, has allowed the case to go by default as to the petitioners and consumers, and is carrying on this litigation for and in the name of the board of supervisors of the county, and at the county expense. The brief is signed in his official capacity. The county has no interest whatever in the litigation, nor has its board of supervisors. It would seem at all events that if the county had any interest in the controversy, it should be to have fair and just rates established as between the real parties in interest and that its official legal adviser would feel it to be his duty not only to the county, but to this court, to present the case with that purpose in view. But, unfortunately, as the evidence shows, the counsel is himself one of these consumers, and is their legal adviser, and he has certainly gone to the farthest extreme in his effort to obtain an undue advantage in this court, as he did before the board of supervisors.

It is difficult, as the court must see, to meet such a presentation of the case by legitimate argument. We can do nothing better, after exposing the method of presenting the case, than trust to the court to look into the record and ascertain the true facts as there disclosed, and disregard the unwarranted and unprofessional assertions of counsel outside of the record. It must be conceded, in fairness, that the necessity of installing and operating pumps rendered the cost of water to consumers greater than it would otherwise have been. But the evidence shows, and this is not denied, that the company not only made no profit out of this additional payment, but that, under the terms of the agreement for the supply of this pumped water, it did not make any profit, but lost money. And it is expressly set forth in the agreement that the extra amount to be paid is to meet the extra expense of pumping the water.

See Contract, Record, p. 153.

It was not only improper that these matters not disclosed by the record, and not true in fact, should have been brought into the case on this appeal, but there is nothing in them that can possibly aid the court in reaching a conclusion upon the questions involved.

VII.

WATER RIGHTS AS AFFECTING RATES.

Counsel has indulged in a thirty page discussion of water rights and bonuses and "exactions" therefor, interspersed with expressions of indignation on his part of such exactions and fulsome eulogy of the learned judge of the court below. This is quite interesting, if not instructive, but the question was in no way involved in the investigation before the board of supervisors; they had no power or jurisdiction to pass upon it, and what was said by the judge of the Circuit Court in his opinion was entirely aside from any question decided in this case. He had held in a previous case that a water company could not legally sell a water right. Upon this question counsel on the other side and the writer of this brief, who were counsel for the parties in that case, entirely disagreed with him. Subsequently both the United States Circuit Court of Appeals and the Superme Court of the State held directly to the contrary. These cases are reviewed by the judge of the court below in his opinion in this case, and his own views previously expressed ably defended.

Record, p. 54.

Counsel commends the opinion in this case for no better reason than that it calls a charge for a water right an "exaction." But if counsel had intended to be fair, he should have said that a very few of the owners of land under this system ever paid any such "bonus" or "exaction," but that to all but a very few of them nothing has ever been charged except the ruinously low annual rates allowed.

But if they had paid a consideration for the water right, this could in no way affect the question of rates. The Civil Code of California provides just what a water right is.

Civil Code Cal., 552.

It is the right to the perpetual use of the water as appurtenant to land "at such rates and terms as may be established by said corpo-

ration in pursuance of law." If a land owner believes a water right on such terms to be sufficiently valuable, he may buy and pay for the right, and hold it subject to payment of the rates. And the "bonus," as counsel is pleased to call it, cannot be "exacted" against his will. He may take the water right and pay for it, or not, just as he pleases.

But the position of counsel is that if he pays anything for the *right* to the water, or pays an enhanced price for land to which it is appurtenant, he is forever after entitled to have the water supplied to him *for nothing*. This is his position, in brief, and notwithstanding his labored effort to establish the proposition, it is too unreasonable to need refutation.

That the conveyance of such water rights to be supplied to land or the conveyance of land to which the right is appurtenant vests title to the water right or the right to the water to the exclusion of others upon payment of the rates established as provided by law. And, of course, under the act of 1897, referred to, or without it, for that matter, this "easement," as counsel calls it, cannot be and is not affected by the statute providing for the fixing of rates, except that the rates may be regulated by the board of supervisors as the act provides.

The statement of counsel of the amounts realized by the company for land by reason of these water rights is like most of his statements, outside of the evidence and fallacious. Not only the land of the company, but all other lands under the system, were enhanced in value by the development of the water. It was, in the beginning, furnishing water to the lands of others free of any charge for a water right, expecting to realize a reasonable return on its investment from rates. The rates have never returned it any profits. It then resorted to the expedient of selling a water right where water was demanded for lands not belonging to the company, in order to save its property. It was decided by the Circuit Court that it could not do this legally, and that source of revenue was cut off. Then the people who bought land from it, and

the very ones to whom it had furnished the water right for nothing, insisted, under the advice of counsel on the other side, that being the owners of the water right, they were not bound to pay the company anything for the water more than sufficient to pay the expense of supplying it, and that by the acquisition of the water right each owner became the owner, also, of a proportionate part of the *water company's plant*. And this is just what he is insisting upon now.

It is not difficult to see why this company went to the wall, or why the market value of its plant, and the value of its bonded debt, could furnish no reasonable basis for fixing rates. It is the policy of counsel to complicate and obscure the simple question of just and reasonable rates by such unreasonable, refined and abstruse claims that should not, and we believe will not, be considered for a moment. The statute, as it has been construed by the courts, so far provides that the company shall have such rates as will return to it not less than six nor more than eighteen per cent of the value of its plant or system. And this must be the guide in arriving at what is a just and reasonable compensation to the company. It is this we ask, and nothing more. The company cannot, as the evidence clearly shows, make one cent of profit for its stockholders out of these rates. The appellant has a right to expect relief from this condition from the courts. It has been disappointed thus far. The court below dismisses the subject by saying:

"In view of all of the facts and circumstances of the case as disclosed by the evidence, *and especially in view of the small quantity of water available for use and actually furnished for irrigation outside of National City at the time the rates in question were fixed*, which amount constantly decreased to the point of exhaustion, I do not think the court would be justified in holding it to be *clear* that the rates fixed by the board of supervisors will *necessarily* have the effect of depriving the complainant of its property without just compensation."

Rec., p. 65.

As we have shown, this statement as to the shortage of water at the time the ordinance was passed was a mistake, and the court

ignored entirely the important fact that as soon as pumps could be installed this condition was relieved.

And thus after a review of the facts showing that by inadvertance the court had omitted from its consideration most important matters favorable to the appellant, and assumed a condition unfavorable to it that did not exist, this was the strongest reason that the court below could give for upholding these ruinous rates.

VIII.

DECEPTION PRACTICED ON THE BOARD OF SUPERVISORS.

We need not take up time in following counsel on this subject at any great length. Of course, the petitioners as mere taxpayers of the county had the legal right to petition for fixing rates. They exercised that right, and followed it by exercising the further right of prosecuting it no further, and of suffering a default to be taken against them. There could be no complaint of their action, nor has any been made. The complaint was against the parties who had a real and tangible interest in the controversy, led by the writer of the appellee's brief, surreptitiously procuring these parties to institute the proceedings with the aid of attorneys employed and paid by the former in order that they might contest the very jurisdiction they had appealed to and procure a decision that they having bought water rights and lands with water, were entitled to have rates such as would pay only operating expenses and no more. The attorneys for the petitioner, making an altogether different and legitimate claim, *were under their pay*, and this was concealed from the board and from counsel on the other side. And they succeeded by this ruse in getting in the evidence that kept the rates at just what they had previously maintained they should be, and that by evidence that never should have been received. This may be according to counsel's standard of professional conduct and ethics, but we trust it will not be generally adopted. That this deception

was practiced is clearly proved by the two attorneys representing the respective parties. That the rates they succeeded in procuring are arbitrary and unjust must be apparent from the record.

And now it seems a little incongruous that the same attorney that inaugurated and carried through this scheme should appear here both for the clients they then represented, and in fact represent still, and nominally for the board of supervisors, whose jurisdiction he contested, and who have no interest whatever in the controversy. He has succeeded in procuring other petitioners having no interest to institute and carry on the proceedings to a point where he, as an officer of the county, could involve the board in the litigation and the taxpayers of the county in the expense of carrying on the litigation to the end, while he and his clients, the only parties in interest, set by and expect to reap the rewards without expense to them. And the claim that the board of supervisors have any interest in the controversy or should be here contesting the appellant's rights when the real parties of record have abandoned it and suffered a default and the real parties in interest have likewise abandoned it, is purely fictitious, and without merit.

IX.

WAS ANY ALLOWANCE MADE FOR DEPRECIATION.

It is not claimed by counsel that allowance was made for depreciation, and he places it upon the rather remarkable ground that the expense account of the company for operation included repairs, and these repairs covered depreciation. We have undertaken in our opening brief to show what is covered by depreciation, and the difference between the expense of repairs and the necessary replacement of the plant eventually, as the effect of depreciation. In arriving at a basis for rates, it is required by the statute that the board of supervisors shall ascertain "their annual reasonable expenses, including the cost of repairs, management, and operating such works, and that in estimating the net receipts and profits to

be returned by the rates, the cost of any extensions, enlargements or other permanent improvements of such water rights or water works shall not be included as part of the said expenses of management, repairs and operating of such works, but when accomplished, may and should be included in the present cost and cash value of such work."

Stat. 1885, p. 96, Secs. 4 and 5.

Thus it will be seen that the cost of operation, including repairs, is required to be provided for by the rates, independently of the question of depreciation or extensions. Common reason must teach any one that the depreciation of a plant that is going on constantly in all of its parts cannot be made good by simply paying for repairs or patching of the pipes that may take place from year to year, and if it were required that every replacement to make good a pipe so far depreciated as to become useless should be paid by rates fixed for the year in which such replacements took place, the burden would, in some years, be unbearable. It was distinctly held by the court below that something should be allowed for depreciation. It is evident from the proof, including that of Mr. Cherry, the supervisor who testified in the case, that no such allowance was ever made. The only expedient to which counsel can resort to avoid the effect of this condition of things is to insist that the payment for repairs covers depreciation. It is claimed that it was decided in San Diego Water Co. v. San Diego, 118 Cal. 556, that no allowance for a sinking fund could be made in favor of water companies. We submit that it cannot be determined from an examination of the numerous opinions filed in the case referred to what was decided on this or any other subject. There were five separate and distinct opinions rendered, and the necessary majority of the court agreed only upon the reversal of the case, and not upon any rule of law that was stated in any of the opinions; and that and the case of Redlands Water Company vs. City of Redlands were cases arising under the Constitution

providing for the fixing of rates in cities and towns, and not under this statute at all; so that they cannot affect the requirements of the statute.

X.

WILL THE ORDINANCE RETURN ANY PROFIT TO THE COMPANY.

Counsel undertakes to show that a profit will be returned to the company by attacking the accounts of the company for expenses of operation and repairs. But this will not do, for the reason that the board of supervisors approved all of these accounts, with the exception of a small item of something over four hundred dollars in the office expenses; but notwithstanding this, counsel attacks with much vigor some of the items of account charged for. In view of the situation it is hardly necessary to follow this discussion further than the statement contained in our original brief on the subject.

It is contended that no allowance should be made to the company for moneys paid out to its attorneys. Any decision to this effect would be a sad blow to water companies in the State of California. It requires the utmost vigilance on their part, with the assistance of their attorneys, to preserve their rights, under the best of circumstances, and the history of this company as it appears in the records of this court will show that the services of attorneys were sadly needed to protect its interests. These expenses, and the taxes required to be paid by the company, and which are also questioned by counsel, have always and invariably been allowed as a proper part of the expenses of such companies, in all cases that have come under our notice, and this is the first time, we believe, that the correctness of these rulings has been assailed, and as we have said, the board of supervisors recognized them as proper items of expense, and allowed them in arriving at its conclusions.

XI.

EFFECT OF THE DOMESTIC RATES.

Counsel has undertaken to justify the conclusion reached by the board of supervisors and the court below, by charging that a mistake was made by the board of supervisors in not including as a part of the revenues the domestic rates allowed to the company. But these domestic rates were not allowed for irrigation. The question before the board of supervisors did not in any way involve the domestic rates, as has been shown above, such rates being satisfactory to both parties concerned. In order to prove that the rates were sufficient to make a sufficient return, counsel has made up a table of his own, on page 145 of his brief, allowing for domestic rates outside of National City,not for the year in controversy,but for the year 1896, and $4,545.13 as taxes on water system, attorney's salary, half of engineer's salary, and expenses of the Boston office, by which he reaches a total of $11,015.79. But upon what theory he excludes from the operating expenses these different items, it is difficult to see, and by thus deducting eleven thousand dollars, he reaches the conclusion that the rates allowed would furnish six per cent. on a capital of $180,000, in round numbers, and that therefore, the company gets a net revenue of six per cent. per annum on $530,000. Of course, by this arbitrary striking out of items properly allowed by the board of supervisors, and about which there has heretofore never been any question, and adding the domestic rates, which have nothing to do with the expense of irrigation or the returns therefrom, counsel might go on indefinitely, and figure out a very handsome return to the company, but his deductions and his conclusions are entirely unjustified, as the evidence clearly shows.

We submit that the decree of the court below should be in all things reversed.

Respectfully submitted,

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2021